Office Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 923

HOLLYWOOD BRANDS, INC.,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FRED S. BALL, JR.,
First National Bank Building,
Montgomery, Alabama,
Attorney for Petitioner, Hollywood Brands, Inc.

Montgomery & Co., "The Brief Specialists", 430 Chartres St., N. O., La.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered and entered on December 20, 1963, to which an application for rehearing was denied on January 29, 1964. The judgment denied petitioner's petition for review of a National Labor Relations Board order dated April 25, 1963, and granted the Board's petition to enforce its order.

DECISIONS BELOW.

The judgment of the Court below is reported in 324 F. (2d) 956, application for rehearing denied, 326 F. (2d) 400. For ready reference a copy is here furnished as Appendix "A."

The Board's order is reported in 142 N. L. R. B. No. 25 (Case Number 15 CA 2103). Its order appears beginning at page 29 of the mimeographed record in the Court below. It adopted, with minor modifications, the findings, conclusions and recommendations of the trial examiner which appear in said record beginning at page 72. A copy of the Intermediate Report and the Board's decision and order are here furnished as Appendix "B."

JURISDICTION.

The statutory provision believed to confer on this Court jurisdiction to issue the writ of certiorari is codified as 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether, in a case where the contract between the employer and the union representing the employees for collective bargaining had expired and where the employer met with the union in several bargaining meetings and offered to renew the expired contract but refused to agree to changes proposed by the union, the employer can be held to have refused to bargain collectively as defined by 29 U. S. C. 158 (d), which provides that the obligation to bargain collectively does not compel either party "to agree to a proposal or require the making of a concession."

Or, put in other words, whether the Board can legally force an employer to agree to union proposals and make concessions despite the provision of 29 U. S. C. 158 (d) that the obligation to bargain collectively does not compel either party "to agree to a proposal or require the making of a concession."

2. Whether an employer with a branch plant can legally be compelled to permit the union to inspect its home plant records in another state to verify the employer's statement that the same wages were being paid at both plants.

3. Whether an employer whose long standing policy has been to pay wages at its branch equal to those paid at its home plant and to give an equal annual wage increase at each plant may legally do so over objection of the union where bargaining is deadlocked.

STATUTORY PROVISIONS INVOLVED.

The statutory provisions involved are those contained in the Labor Management Relations Act of 1947 codified as 29 U. S. C., Section 141, *et seq.*, and particularly those contained in Section 158 relating to unfair labor practices and the obligation to bargain collectively, as defined in Subsection (d), which is as follows:

> "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or

the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:"

STATEMENT OF THE CASE.

In response to a charge (R. p. 7)* filed on June 4, 1962, with the National Labor Relations Board by United Bakery & Confectionery Workers Local 441-B, herein for brevity called the Union, a complaint (R. p. 9) was issued against the employer alleging, among other things not relevant here, that the employer had:

—Refused to bargain and had "negotiated with the Union in bad faith with no intention of entering into any final or binding collective bargaining agreement." (Par. 11, R. p. 12.)

—Refused upon request "**to furnish** pertinent data in regard to the wages being paid employees at respondent's Centralia, Illinois, and Montgomery plants . . ." (Par. 12, R. p. 12.)

—"Unilaterally changes existing wage rates." (Par. 14, R. p. 13.)

The employer, in its answer (R. p. 14):

—Denied that it had refused to bargain in good faith but, on the contrary, had met with the Union on

* The reference "R" refers to the Mimeographed Record in the Court below.

three occasions and, each time, offered to renew the previous expired contract, but the Union would not agree unless the employer would consent to proposed changes. (Pars. 10 and 11, R. p. 15.)

—Denied that the Union had requested "data" in regard to wages but had requested permission to look at the company's books. (Par. 12, R. p. 16.)

—Denied that it had "unilaterally" changed existing wage rates, if that term meant that it was done improperly. It stated that the employer's policy for a number of years (actually since the Montgomery plant was opened in 1947, thirteen years before) was to give an annual wage increase at its home plant and to pay the branch plant employees the same wages as paid at its Centralia plant and that when an annual wage increase of 3% was given on July 9, 1962, to Centralia plant employees, the employer, after notice to the Union of its intention to do so, gave the Montgomery plant employees a similar wage increase. At that time the employer and the Union had been deadlocked in their contract negotiations for more than seven months. (Par. 14, R. p. 16.)

In the hearing before the trial examiner there was no conflict in the evidence.

(Refusal to Bargain)

It was without dispute that after the 1961 contract (R. p. 39) expired, the Union requested that the employer negotiate with reference to a new contract and that there were three negotiation meetings, namely, on November 29, 1961; January 23, 1962, and April 17, 1962. There

was no dispute as to what took place at the meetings. The employer had them reported and transcribed. (Joint Exhibits 1, 2 and 3.)

The result of each meeting was the same. The union proposed changes in the former contract relating to arbitration, seniority, job classification, work schedule and a wage increase. There was discussion, but the employer refused to agree to any of the Union proposals. On each occasion the employer stated its willingness to renew the former contract. The Union declined. Each meeting ended in a deadlock.

The trial examiner held that, by refusing to do more than renew the old contract, the employer had taken an "unyielding position" and not a "bargaining position" and had refused to bargain "in good faith." (R. p. 66.) The Board order (R. p. 29) adopted his holding and ordered the employer to bargain collectively as defined in Section 8 (d) of the Act:

(Refusal to Allow Inspection of Books)

It was without dispute that during the last of these meetings that mention was made by the employer of its policy to keep the Montgomery plant wages equal to those of the Centralia plant, and the Union representative Parker asked to "look at the employer's books to determine what the parallel wages are in these two places." (Joint Exhibit 3, page 48.) (Exhibit "C.")

Without dispute, as shown by the transcript of the meeting (page 48), the Union representative did not re-

quest information about the wages paid at the two plants. He asked to **see the employer's books.**

The trial examiner's order, adopted by the Board and ordered enforced by the Court below, requires the employer to (R. p. 72):

> "(b) Furnish and make available for inspection by the Union all pertinent payroll data and other records proposed by Respondent as the basis of establishing wage rates, job classifications, or other terms and conditions at its Montgomery, Alabama, plant including all such records maintained at its plant in Centralia, Illinois."

(Wage Increase)

It was without dispute that it was the employer's policy to give the Centralia employees an annual increase in wages.

It was also without dispute it had been the employer's policy since the Montgomery branch was opened to pay the same wages as those paid at the Centralia plant.

Likewise, without dispute, in July 1962 the employer gave its Centralia employees a customary annual wage increase. This time it was a blanket 3%. It then notified the Union that it planned to give the Montgomery employees a similar wage increase. It gave the increase despite the Union's objection.

Without dispute, the increase was made in July 1962 at a time when the parties had been deadlocked for more than seven months.

The trial examiner held (R. p. 68) that the conduct of the employer in granting a wage increase "without consulting the union" "constitutes a refusal to bargain within the meaning of Section 8 (a) (5) of the Act."

The Board (R. p. 32) ordered the employer "not to make any changes with respect to rates of pay, wages, hours of employment, and other conditions of employment in the bargaining unit described herein, without prior consultation with RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO, and or its agency subdivision, UNITED BAKERY & CONFECTIONERY WORKERS LOCAL 441-B."

(Consequences of Judgment to Enforce)

The consequences resulting from the order of the Court below ordering enforcement of the Board order, are:

1. In future negotiations with the Union, the employer must agree to Union's proposals and make concessions or be subject to contempt proceedings.

2. Unless the employer allows the Union to look at its books, it makes itself subject to contempt proceedings.

3. If the employer follows its policy of giving its Centralia employees an annual wage increase which is due in the spring or summer of this year and of giving the Montgomery employees a similar increase without "consulting" the union and presumably obtaining its permission, it makes itself subject to contempt proceedings.

REASONS FOR GRANTING THE WRIT.

There are special and important reasons for granting the writ.

REASON ONE. The decision of the Court below enforces a National Labor Relations Board order which is in direct conflict with the decisions of this Court in:

N. L. R. B. v. American National Insurance Company, 343 U. S. 395, 96 L. Ed. 1027, 72 S. Ct. 824;

N. L. R. B. v. Truitt Manufacturing Company, 351 U. S. 149, 100 L. Ed. 1027, 76 S. Ct. 753;

N. L. R. B. v. Wooster Div. of Borg Warner, 356 U. S. 342, 2 L. Ed. (2d) 823, 78 S. Ct. 718.

REASON TWO. This case presents three questions under the Labor Management Relations Act of 1947, each of which is of sufficient importance to merit consideration by this Court, namely:

(a) Whether a party to collective bargaining may maintain a position taken in good faith without being forced by the National Labor Relations Board to agree to proposals by the other party or to make concessions.

(b) Whether a union can compel an employer to allow inspection of its books relating to wages paid.

(c) Where an employer's policy is to give an annual wage increase at its home plant and to pay parallel wages at its branch plant, whether, over the objection of a union

with which it has bargained to a deadlock, it may give an equal wage increase to its branch plant employees.

DISCUSSION OF REASONS.

First, and of much importance, is the point that this record is free from controversy as to the facts. There is no dispute as to what happened. The Board's attorneys do not contend otherwise.

The Court below did not discuss the facts. It merely supports the findings of the Board.

It is petitioner's position that the facts are not in dispute and that the findings by the Board do not support its decision.

(Refusal to bargain)

Thus, there is no dispute as to what was said in the three bargaining meetings as they were reported and the transcripts are exhibits in this case. Even the communications between the Union representative in Birmingham and the employer's representative in Montgomery were in the form of letters.

These transcripts show without dispute that the result of each meeting was the same, namely, the Union was determined to wrest concessions out of the employer and the employer was equally determined to make no concessions other than those contained in the old contract which it offered to renew.

The trial examiner characterizes the position by the employer as being "unyielding". In his report (R. p. 66) is this:

> "It merely took the unyielding position (not a bargaining position) that the old contract was the only thing it would enter into in the nature of a collective-bargaining agreement. By adopting such a position, I find that the Respondent refused to bargain in good faith with the certified exclusive representative of its employees in violation of Section 8(a)(5) of the Act."

The Union likewise took the "unyielding position" that it must have further concessions and that it would not enter into a renewal of the old contract.

Each of the parties was thus "unyielding" in its position.

But that does not justify the Board in singling out the employer and holding that for refusing to yield it refused to bargain.

What is a "bargaining position"?

Is it a position in which one of the parties must yield to the demands of the other?

That is what the employer will have to do in this case unless this Court comes to its rescue and gives it the protection which Congress intended a party to have when it provided in Section 158 (d) that the law does not require a party to agree to a proposal or to make a concession.

The effort of the Board to compel concessions was dealt with by this Court in *N. L. R. B. v. American Na-*

tional Insurance Company, 343 U. S. 395, 96 L. Ed. 1027 as follows:

> "The National Labor Relations Act is designed to promote industrial peace encouraging the making of voluntary agreements governing relations between unions and employers. **The Act does not compel any agreement whatsoever between employees and employers.** Nor does the Act regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement. The theory of the Act is that the making of **voluntary** labor agreements is encouraged by protecting employees' rights to organize for collective bargaining and by imposing on labor and management the mutual obligation to bargain collectively.
>
> "Enforcement of the obligation to bargain collectively is crucial to the statutory scheme. And, as has long been recognized, performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences. Before the enactment of the National Labor Relations Act, it was held that the duty of an employer to bargain collectively required the employer 'to negotiate in good faith with his employees' representatives; to match their proposals, if unacceptable, with counter-proposals; and make every reasonable effort to reach an agreement.' The duty to bargain collectively, implicit in the Wagner Act as introduced in Congress, was made express by the insertion of the fifth employer unfair labor practice accompanied by an explana-

tion of the purpose and meaning of the phrase 'bargain collectively in a good faith effort to reach an agreement.' This understanding of the duty to bargain collectively has been accepted and applied throughout the administration of the Wagner Act by the National Labor Relations Board and the Courts of Appeal.

"In 1947, the fear was expressed in Congress that the Board 'has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counter-proposals that he may or may not make.' Accordingly, the Hartley Bill, passed by the House, eliminated the good faith test and expressly provided that the duty to bargain collectively did not require submission of counterproposals.

"As amended in the Senate and passed as the **Taft-Hartley Act**, the good faith test of bargaining was retained and written into § 8 (d) of the National Labor Relations Act. **That Section contains the express provision that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession.**

"Thus it is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position. And it is qually clear that the Board may not,

either directly or indirectly, compel coficessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." (Emphasis added.)

In the case at bar, the employer made a frank statement of its position.

Its position was that it was willing to sign a new contract like the old one.

The old contract (R. p. 39) was a complete contract. It covered, among other things, provisions relating to:

—wages
—management clause
—work hours
—paid holidays
—vacations
—strikes and lockouts
—health and accident insurance
—disputes and grievances
—seniority

It embodied the agreement which the employer was willing to renew. The Union wanted a contract with different provisions to which the employer was not willing to agree.

The Union would not agree to renew the old contract and the employer would not agree to something else. It was a typical case of deadlock with each party maintaining a position it had a right to maintain.

The effect of the Board's decision is to compel the employer to yield. This the law does not require.

Thus in *N. L. R. B. v. Truitt Manufacturing Company*, 351 U. S. 149, 100 L. Ed. 1027 (1955) this Court in line with its holding in *American Insurance* wrote:

> "While Congress did not compel agreement between employers and bargaining representatives, it did require collective bargaining in the **hope** that agreements would result." (Emphasis added.)

Again in *N. L. R. B. v. Wooster Division of Borg-Warner Corporation*, 356 U. S. 342, 2 L. Ed. (2d) 823 (1958), this Court wrote:

> "We turn first to the relevant provisions of the statute. Section 8 (a)(5) makes it an unfair labor practice for an employer 'to refuse to bargain collectively with the representatives of his employees. . .' Section 8 (d) defines collective bargaining as follows:
>
> "'(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, **but such obligation does not compel either party to agree to**

a proposal or require the making of a concession . . .

"Read together, these provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment . . .' The duty is limited to those subjects, and within that area **neither party is legally obligated to yield.** N.L.R.B. v. American Nat. Ins. Co., 343 U. S. 395, 96 L. Ed. 1027, 72 S. Ct. 824." (Emphasis added.)

In the case at bar, as in the days before the 1947 Taft-Hartley Act when, as stated in the *American National Insurance case* (343 U. S. at page 404), the Board is "setting itself up as a judge of what concessions an employer must make." It seeks to compel the employer to give up what its trial examiner (R. p. 66) calls an "unyielding" position and to **yield** to union demands.

It is, therefore, submitted that the Board order directing the employee to "cease and desist from refusing to bargain", enforced by the Court below, is directly in conflict with the three decisions of this Court cited above, holding that where the parties are not able to voluntarily reach an agreement the Board has no right to compel it.

If this decision is allowed to stand it will be authority for the proposition that a party to bargaining negotiations may no longer make a frank statement of its position and maintain it without yielding to the other.

This is squarely in conflict with the rights of the parties under Section 198 (d) and as set out in this Court's *American National Insurance Company* case, *supra*.

(Inspection of Records)

The Board order (R. p. 72) requires the employer to "make available for inspection by the Union all pertinent payroll data and other records. . ."

There is no provision in the federal statutes which requires an employer to allow a union to inspect its employment records.

There is no decision so holding.

This is not a case where the employer has claimed financial inability to increase wages as in the *Truitt* case (351 U, S. 149.)

The Union has never requested **information.** It asked to see the records. Without dispute the employer has never been asked for **information** about the wages paid at its Centralia plant. It is obligated to and is willing to furnish **information.** There is no law which authorizes the Board to order it to give the Union access to its records.

(Wage Increase)

It is without dispute that when the Montgomery plant had been in operation about six months the employees were notified in writing (Appendix "D") that the company's policy was to pay comparable wages in its plants.

It is without dispute that the employee had been given blanket pay raises each year since 1948 except in 1949, 1952 and 1958. Each year since 1953, a period of

nine years, there had been a blanket pay raise. In the last eight years it had been a percentage of from four to five per cent except in 1958 when the equivalent was given in hospital benefits. The time had been as early as February but was usually in the spring or summer.

The last pay raise prior to the one in question of July 1962 had been sixteen months before in March 1961 when a 4 per cent raise had been given. It was time for another annual raise.

The Centralia employees were given a 3 per cent raise effective July 9, 1962. Under company policy, the Montgomery employees were entitled to receive a similar wage increase.

The Union and the employer had then (July 1962) been deadlocked in their negotiations since their first meeting on November 29, 1961, or a period of more than seven months.

On July 9, 1962, the employer's representative wrote the Union representative calling attention to the employer's policy of giving an annual pay increase, stated that effective July 9, 1962, a 3 per cent raise had been given at Centralia and that in accordance with the policy of paying comparable wages at Montgomery, the employer planned to increase the Montgomery wages an equal amount. Attention was called to the deadlock in negotiations but the Union was offered an opportunity to state any grounds of objection it might have. A copy of the letter and the reply is Appendix "E" hereto.

Several days later, on July 16, 1962, a member of the Union committee telephoned and objected on the ground that a percentage increase was not fair because it did not give production workers a larger increase than the negro men and she thought it ought to be discussed.

The following day (July 17, 1962, Joint Exhibit 6 (1)) Parker wrote objecting to the raise but not stating any grounds. (Appendix E).

The raise was put into effect at the Montgomery plant effective July 9, 1962, the same date as at Centralia.

The Board order (R. p. 31) is that the employer "cease and desist from making any changes with respect to rates of pay . . . without prior consultation with Retail Wholesale and Department Store Union. . .".

What is meant by "prior consultation" is not stated but in view of the fact that the employer gave the 1962 wage increase after notifying the Union of its intention to do so and over the Union's objection, the evident meaning of the phrase "without prior consultation" must be intended to mean without first obtaining the Union's consent.

Consultation is defined in Webster's New International Dictionary 2nd, as

> "1. Act of consulting or conferring; deliberation of two or more persons on same matters.
>
> "2. A council or conference to consider a special case."

"To 'consult' is, as Webster states, 'to seek the opinion or advice of another; to take counsel; to deliberate together; to confer'." Quoted from:

Garman v. Metropolitan Life Insurance Company, 175 F. (2d) 24, at 27, C. A. 3.

"The word consult means,—'To seek the opinion or advice of another; to take counsel; to deliberate together; to confer . . .; to apply for information or instruction. . .'"

Webster's New International Dictionary, 2d Edition.

"There is no suggestion that consulting implies obtaining consent."

C. I. R. v. Walthen Dist. Co., 147 Fed. (2d) 998, at 1001.

The Board went beyond its authority in ordering the employer to cease and desist from making any changes with respect to rates of pay without prior consultation with the Union.

CONCLUSION.

It is submitted that the Board's order, enforced by the Court below, puts petitioner in a legally impossible position.

Thus, with reference to the order to "bargain" with the Union, the only way petitioner can now "bargain" is by doing more than it has already done in stating its willingness to enter into a new contract similar to the old one. Obviously, if it is to escape punishment by contempt it must "bargain" by making concessions.

But **what** concessions? The order does not specify. Must it make concessions with reference to the increased rate of holiday pay? Or increased vacations? Or a wage increase? Or some other concession?

In order not to be in contempt of court must petitioner agree to **all** the Union demands or only some of them and if so, which ones?

Petitioner must act and in doing so it must try to guess how much to give to avoid punishment and if it guesses wrong it subjects itself to punishment for contempt.

On the question relating to future wage increases in accordance with petitioner's long standing policy of equalizing Montgomery wages with those paid at Centralia, what happens when the 1964 spring or summer annual increase is given at Centralia in which the Union has no interest?

If it first "consults" the Union as it did before and increases wages over its objection, will the employer thereby make itself subject to punishment for contempt?

But, on the other hand, if the employer does **not** give the Montgomery employees a raise equal to Centralia, it violates its promise to keep the wages equal. In order to obey the Board's order it must break its promise to its employees.

The predicament in which the employer finds itself should indicate the error of the decision of the Court

below enforcing the Board's order and the need for this Court to take this case for consideration.

Respectfully submitted,

FRED S. BALL, JR.,
Attorney for Petitioner.

CERTIFICATE.

I hereby certify that a copy of the foregoing brief has been served on opposing counsel on this ..... day of ....., 1964.

FRED S. BALL, JR.

APPENDIX "A"

Copy of judgment in Circuit Court of Appeals rendered December 20, 1963.

> "PER CURIAM: IT APPEARING that the only issues before the Board are fact issues, and it further appearing that there was substantial evidence in the record as a whole to support the findings of the Board, IT IS ORDERED that the Order of the Board shall be ENFORCED."

Copy of judgment in Circuit Court of Appeals denying application for rehearing on January 29, 1964.

> "PER CURIAM: On rehearing petitioner earnestly urges that the questions of (1) whether it refused to bargain in good faith on contract changes proposed by the Union, (2) whether it refused to furnish to the Union access to pertinent wage data, and (3) whether its grant of a wage increase without consulting the Union amounted to a violation of sections 8 (a)(5) and (1) of the Act present issues of law rather than of fact as held in our per curiam enforcing the order of the Board. We disagree. The law concerning all three questions is so well settled as not to justify further discussion. The only debatable question concerns the Board's factual inferences and findings which, in our opinion, are supported by substantial evidence in the record. The petition for rehearing is DENIED."

DECREE

Before: Rives and Cameron, Circuit Judges, and Hunter, District Judge.

BY THE COURT:—

THIS CAUSE came on to be heard upon the petition of Hollywood Brands to review and set aside a certain order of the National Labor Relations Board issued against petitioner on April 25, 1963, and upon cross-petition of the National Labor Relations Board to enforce the said order. The Court heard argument of respective counsel on December 4, 1963, and has considered the briefs and transcript of record filed in this cause. On December 20, 1963, the Court, being fully advised in the premises, handed down its decision enforcing the order of the National Labor Relations Board.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Hollywood Brands, its agents, supervisors, successors and assigns abide by and perform the directions of the Board in said order contained.

ENTERED: FEB. 7, 1964.

(ORIGINAL FILED—FEBRUARY 7, 1964)

IR-27-63

APPENDIX "B."

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

HOLLYWOODS BRANDS, INC.,
and
UNITED BAKERY & CONFECTIONERY WORKERS LOCAL 441-B

Case No. 15-CA-2103

Emile C. Ott, Esq., of New Orleans, La., for the General Counsel.
John L. Parker (Representative) of Birmingham, Ala., for the Charging Party.
Fred Ball, Esq., of Montgomery, Ala., for the Respondent.
Before: Lee J. Best, Trial Examiner.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

This proceeding brought under Section 10(b) of the National Labor Relations Act, as amended, 29 U. S. C. Sec. 151, et seq., (herein called the Act) was heard before Trial Examiner Best at Montgomery, Alabama, on October 1, 1962, with all parties represented. Based upon a charge filed on June 6, 1962, by United Bakery & Confectionary Workers Local 441-B (herein called the Union or Charging Party), the General Counsel of the National

Labor Relations Board issued a complaint on August 10, 1962, which was amended on August 16, 1962, alleging that Hollywood Brands, Inc., (herein called the Respondent) has engaged in and is engaging in unfair labor practices proscribed by Section 8(a)(1) and (5) of the Act. The principal issues litigated were whether the Respondent (1) refused to furnish pertinent information and data from its records with respect to wages paid to its employees; (2) unilaterally changed existing wage rates without negotiating with the Union; and (3) refused to bargain in good faith with the Union as exclusive representative of its employees in the unit found to be appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

The Respondent filed an answer to the complaint admitting allegations with respect to commerce, admitting that it refused a request of the Union to examine its books, and admitting that certain wage increases were unilaterally put into effect under conditions not constituting unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

All parties were represented by counsel, afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues involved, to present oral argument on the record, and to file written briefs with the Trial Examiner. Oral argument and written briefs submitted by counsel for the General Counsel and the Respondent have been given due consideration.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

Findings of Fact

I. Business of the Respondent

Hollywood Brands, Inc., is a corporation organized and existing under and pursuant to the laws of the State of Minnesota, having plants and places of business in Centralia, Illinois, and Montgomery, Alabama, where it is engaged in the manufacture of candy.[1] The Montgomery plant of Respondent is a division of Hollywood Brands, Inc., sometimes called Hollywood Nut Products Co., and Hollywood Candy Co. During the calendar year 1961, which period is representative of all times material herein, the Respondent in the conduct of its business operations purchased goods and materials valued in excess of $50,000, which were shipped to its Montgomery plant in interstate commerce from points outside the State of Alabama; and during the same representative period sold and shipped directly from its Montgomery, Alabama, plant to points outside that State products valued in excess of $50,000.

I find, therefore, and it is admitted, that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The labor organization involved

Retail, Wholesale and Department Store Union, AFL-CIO, and its local subdivision, United Bakery & Confectionery Workers Local 441-B (herein called the Union) is a labor organization within the meaning of Section 2(5) of the Act, existing in whole or part for the purpose of representing employees in dealing with employers con-

[1] Only employees at the Montgomery, Alabama, plant are involved in this proceeding.

cerning labor disputes, grievances, and the negotiation of collective-bargaining agreements with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

The Appropriate Unit

All production, maintenance, shipping and cleaning employees of the Respondent's Montgomery, Alabama, candy manufacturing plant, excluding office employees, executives, watchmen and guards, truck drivers, salesmen, foremen, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

III. The unfair labor practices

A. Background information

The headquarters or home office of the Respondent is located in Centralia, Illinois, where its principal corporate officials and board of directors reside in proximity to its parent manufacturing plant. The principal officers are President F. A. Martoccio and Executive Vice President C. R. Martoccio, who establish and control overall operating policies for the corporation. The Montgomery, Alabama, plant (Hollywood Nut Products Co.) was established in the early part of 1947, and placed under the supervision of Vice President Ray Harms as general manager. On or about July 19, 1947, Executive Vice President C. R. Martoccio published a wage policy letter pertaining to the Montgomery plant, as follows:

> Hollywood Nut Products Co., a Division of Hollywood Brands, Inc., has been in operation in

the City of Montgomery for approximately six months. In the early stages of our operations, as in all new ventures, it was necessary to assemble and train personnel for our type of work. The management of Hollywood Brands, Inc., now feels that this training period has progressed to the point where people employed in its Montgomery Plant are able to perform their work in a comparable manner with those people employed in its other manufacturing plants.

In keeping with the policy of Hollywood Brands, Inc., in paying comparable wages in all of its plants, many of you will find increases in wages included with this pay check. The rate per hour you are now making is the same hourly rate paid by Hollywood Brands, Inc., in its other candy manufacturing plants for the same work you are doing.

The company will expect you to perform work in a manner equally efficient with its other operating units so that production in the Montgomery Plant can be maintained on an equal basis with its other plants.

Very truly yours,

HOLLYWOOD BRANDS, INC.

/s/ C. R. Martoccio

C. R. Martoccio

EXECUTIVE VICE PRESIDENT.

B. Union representation at Montgomery plant

Pursuant to a representation election[2] held under auspices of the National Labor Relations Board on May

[2] See Case No. 15-RC-2089.

4, 1960, Retail, Wholesale and Department Store Union was duly elected and certified on May 12, 1960, as exclusive bargaining representative for all employees of the Respondent in the aforesaid appropriate unit at its Montgomery, Alabama, plant. Thereafter the Respondent entered into a written collective-bargaining agreement with the Union,[3] as follows:

AGREEMENT

In consideration of the mutual promises hereinafter recited between Hollywood Brands, Inc., hereinafter called the employer, and Retail, Wholesale and Department Store Union Affiliated with the A. F. L.-C. I. O. or its successor, and the United Baking and Confectionery Workers Union Local Number 441-B, hereinafter called the Union, which, in an election held by the N. L. R. B. on May 4, 1960, was selected by a vote of 79 for as opposed to 74 against and duly certified as the representative for the purpose of collective bargaining with respect to rates of pay, wage and hours of employment for all employees of the employers' Montgomery, Alabama, candy manufacturing plant who are certified by the N. L. R. B. in the above election as the bargaining unit, said employer and union agree as follows:

1.

Any individual employee or group of employees shall have the right at any time to present grievances to the employer.

Membership or non-membership in the Union shall be at the option of each employee without discrimination

[3] This agreement expired on October 15, 1961.

or intimidation by the employer, the Union or any member thereof. Solicitation for membership in the Union shall not be done during working hours.

2.

The minimum wage rate shall be as follows:

Male Employees—	
Starting pay for first 60 days	$1.10 per hour
After first 60 days	$1.54 to $1.56 per hour
Female Production Employees—	
Starting pay for first 60 days	$1.00 per hour
After first 60 days	$1.20 per hour
Warehouse and Clean Up—	
Starting pay for first 60 days work	$1.00 per hour
After first 60 days	$1.31 per hour
Maintenance—	
Maintenance employees	$1.80 per hour

3.

The employer shall have the exclusive right to, at all times, change, modify or cease its operations, processes or production, in its discretion, and in the event of such changes, modification or cessation of operations, processes or production, the employer shall be the sole judge of all factors involved, including (but not limited to) the efficiency, usefulness and practicability of machinery, processes, location of business and personnel. The Union will not interfere in any way with the sales policies of the employer or with its source of supplies of raw materials, equipment, supplies, power or other articles required by the employer in its unlimited discretion.

4.

When work is available the regular work week shall be forty hours, between Monday morning and Sunday night, inclusive. All work done in excess of forty hours in any one week shall be paid for at the rate of time and one-half. The term "employee" shall mean only those employees who are certified by the N. L. R. B. as the bargaining unit.

5.

The employer will allow the following paid holidays:

New Year's Day
Memorial Day (May 30)
Independence Day
Thanksgiving Day
Christmas Day
Labor Day

All hourly employees on the payroll shall be paid the regular rate of pay of eight hours per day on each of the aforesaid six holidays. In addition, for any work performed on the aforesaid six holidays, the employee shall be compensated at the regular rate of pay. Holidays shall be on the days nationally celebrated. To qualify for the holiday pay, the employee must have worked his regularly scheduled shift the day before and the day after the holiday except where the employee is then on regular vacation or on authorized leave of absence not exceeding one week.

6.

(a) The employer shall allow vacations of one week to each employee who has had from one to five years

service, and two weeks to employees with more than five years continuous service.

(b) The employer shall set the date for the vacations.

(c) Vacation pay shall be equivalent of forty hours per week at the regular rate of pay.

7.

The direction of the work and the selection, retention, promotion and transfer of employees shall lie with the employer. All employees shall observe rules and regulations made by the employer for the conduct of the plant operation. Any employee shall perform any service at any time in the plant which he is required to perform and which, in the judgment of the employer he is qualified to perform.

8.

Any employee promoting, aiding, abetting or participating in any "wildcat" strike against the employer shall be immediately discharged. A "wildcat" strike within the meaning thereof is a strike, work stoppage, slowdown or wilful interruption of production without written notice by responsible officers of the Union having been given to the employer.

9.

No lockouts, boycotts, strikes, stoppage, slowdowns, or other such interruptions of work shall be permitted by the Union during the life of this agreement.

10.

The employer shall provide health and accident insurance for each employee and also furnish:

(a) A one thousand dollar life insurance policy for each employee who is under the age of 65 years.

(b) A five hundred dollar life insurance policy for each employee who is over the age of 65 years.

11.

If during the term of this agreement, any dispute shall arise between the employer and the Union, or between the employer and an employee or employees respecting the meaning or application of the provisions of this agreement, there shall be no strike, stoppage of work, slowdown or wilful interruption of production on account of such dispute but earnest effort shall be made to settle and compose such dispute immediately and in the following manner:

(a) The Union or aggrieved employee or employees shall file with the employer a statement in writing of the dispute within five days of the date of the occurrence giving rise to the dispute, and an effort shall be made to solve such dispute through negotiation and discussion between the employer and the Union or the aggrieved employee or employees.

(b) If, thereafter, no settlement is agreed upon, the Union may, at its option, terminate this agreement upon giving thirty days notice in writing of its intention to do so. Such notice shall be given by registered mail ad-

dressed to the employer at 8 Lafayette Street, Montgomery, Alabama.

12.

In cases of increase or decrease of forces, discharges, lay-offs, promotions and demotions, the employer will give due regard to such factors as length of service, knowledge and ability. If, in the opinion of the employer, the other factors are equal, length of service will govern. The employer shall have the right to designate a working foreman on any shift it may deem necessary. Such working foreman will not be a member of the bargaining unit during his work in such capacity.

13.

This agreement contains the whole of this agreement between the parties and there are no other agreements, representatives or inducements not expressed herein. This agreement shall be effective as of the date hereof and shall continue in force up to October 15, 1961 unless terminated sooner by the Union under paragraph eleven hereof.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 24th of April, 1961.

C. Proposals for a new agreement

Prior to expiration of the foregoing collective-bargaining agreement, the Union by letter dated September 15, 1961, notified the Respondent that it desired to reopen and make changes in the contract with respect to wages, hours and working conditions. By letter of October 25, 1961, the Union proposed certain changes in the collective-bargain-

ing agreement, and requested that the Respondent meet and negotiate with the Union concerning (1) an arbitration clause to be established in the contract, (2) a seniority and better working conditions clause to be established, (3) all jobs to be classified, (4) a notice of 3 days to be posted before changing work schedules, and (5) a substantial wage increase for all employees. In reply thereto, the Respondent, by its attorney, Fred Ball, Esq., on October 27, 1961, posted a letter to the Union, as follows:

> Mr. Harms has referred to me your letter of October 25th with reference to proposed changes in the agreement and asking for a time next week for a meeting.
>
> If I am correct, there is no agreement in effect at the present time. The agreement which was made earlier in the year expired on October 15, 1961.
>
> With reference to the five proposals for discussion in the meeting, it would only be fair for me to tell you now that the company is not willing to agree to any of these five items.
>
> If you want to propose a new contract for a period of one year identical with the one which has expired, that could be done without the necessity of a meeting.
>
> I realize that it is the duty of the company to meet and negotiate and am willing to do so, but at the same time it seems to me that it would be a waste of your time as well as ours to meet for the

purpose of discussing the five points, none of which are agreeable to the Company. However, if you insist upon meeting it will have to be at a date later than next week in view of the fact that Mr. Helms who, as you know, sits with me will not be available next week. If you want to suggest a later date I will be glad to see what we can do and let you know.

The current collective-bargaining agreement expired on October 15, 1961, and thereafter the negotiating parties held three bargaining sessions on November 19, 1961, January 23, 1962, and April 17, 1962, respectively, in an effort to reach a new agreement. The Respondent furnished a court reporter to make a complete and accurate transcript of all proceedings therein, which was introduced in evidence by stipulation of the parties. At all meetings the Respondent was represented by Attorney Fred Ball and Personnel Director J. D. Helms. From the beginning of negotiations, the Respondent proposed to renew the expired contract in identical language, and consistently refused to vary any terms or conditions thereof, except to the extent that changes in the Federal minimum wage law might require a restatement of minimum wage rates to employees. At the first two meetings, the chief negotiator for the Union was Representative C. T. Daniel.

With respect to the grievance procedure provided in Article 11 of the old contract, Mr. Daniel proposed the submission of grievances to an impartial umpire or arbitrator upon failure of the parties to reach an agreement. As to that proposal, Attorney Ball with finality said:

"Well, I've explained to you that we are not going to agree to some outsider coming in and making any decisions concerning our operations. We're just not willing to do it, period." The Union next proposed a revision of Articles 2 and 12 of the old contract to establish more definite job classifications and seniority provisions. This subject was postponed at request of Attorney Ball that the Union prepare and submit a classifications list for his consideration and later discussion. The Union next proposed that the contract contain a provision for notice to the Union before changing work schedules. Respondent contended that it was already giving as much notice as possible, but refused to include in the contract any provision that would make any notice obligatory. The Union next proposed to include in the contract some definite and flexible rules concerning sick leave whereby an employee would not lose seniority upon returning to work after an extended period of disabling illness. With respect thereto Attorney Ball said: "I'm not going to agree to put that into the contract, but I will talk to Mr. Harms[1] about it and see if something more satisfactory to the employees can be worked out." Finally the Union proposed an overall wage increase of 25 cents per hour, and Attorney Ball replied: "Well, I have already written Mr. Daniel that we were not going to give any pay increase." In addition thereto, Attorney Ball explained that it was company policy to pay the same wage rates at the Montgomery plant that were paid at the parent plant in Centralia, Illinois, and said: "You see, that's one reason that we couldn't even think about a pay raise, because as I understand it, we do keep the two companies on the same pay scale. Whether they have done

[1] General manager of the Montgomery plant.

it always, I don't know, but I know they are doing it now —at least, that's what they tell me." In summarizing the situation, Attorney Ball said: "We have worked under a contract now that we have had, and it has proven to be one that has worked out all right, and I think it is good enough like it is; and I hope you all will decide to let well-enough along, and renew this contract and let it go."

At the second meeting on January 23, 1962, most of the discussion was devoted to unsettled grievances, and the Union persisted in its demands for the arbitration of grievances, job classifications, seniority provisions, and notice before making changes in work schedules, but the Respondent refused to make any changes whatever in the old contract. In conclusion, Attorney Ball said: "Well, I'm just hoping that you will drop me a note and say 'dear Mr. Ball, please rewrite the contract as to 5 October,' and send it to me, and we'll get it signed up."

At the third and final meeting for negotiations on April 17, 1962, International Representative John L. Parker appeared as chief negotiator for the Union. At that time the Union submitted to Respondent in writing proposals to be included in a new contract, as follows:

1. It is agreed that should any charge of violation of this Agreement, charge of discrimination, grievance or dispute arise at any time, the matter must be brought up within five (5) days after the alleged occurrence. Such matter shall be settled in the following manner:

(A) Between the aggrieved employee and the foreman of the department involved, and if the employee is

unable to settle his grievance at this point, he shall reduce it to writing;

(B) Between the employee and the members of the Grievance Committee designated by the Union, and the superintendent and or manager of the plant involved;

(C) Between the representative of the International Union and the representative of the Employer involved;

(D) In the event the dispute cannot be satisfactorily settled within ten (10) days after the matter has been brought up, then within ten (10) days it shall be appealed an an impartial umpire to be appointed by mutual consent of the Employer involved and the Union or, in the event the parties fail to agree, by the Director of the Federal Mediation and Conciliation Service, Washington, D. C. The decision of the umpire shall be final and binding, and to be rendered within ten (10) days after submission to him. The salary and expenses incident to the services of the umpire shall be shared equally by the Employer involved and the Union.

2. There shall be no stoppage of work by the Union or its members or lockouts by the Employers pending the hearing and determination of any dispute and conditions involved in the dispute shall remain the same during the hearing, and decision reached at any stage of the proceedings as herein provided shall be final and binding on both parties and shall not be subject to reopening except by mutual agreement.

3. The Grievance Committee shall consist of not less than three (3) or more than five (5) employees of

the plant who shall serve without pay as may be required unless meetings are called at the request of the Employer for official acts of the Grievance Committee in which event they shall be paid by the Employer involved.

4. It is agreed by and between parties hereto that there will be no concerted failure to report for work, cessation or interruption of work, slowdown, strike or picketing or lockout during the term of this Agreement or during any period of time while negotiations are in progress between the parties hereto for the continuance or renewal of this Agreement.

5. The parties agree as part of the consideration of this Agreement that neither the International Union, the Local Union, nor any of its officers, agents or members, shall be liable for damages for any of the acts set forth above, provided that the Union has not authorized such acts and that the Union cooperates in getting the employees to discontinue any of such acts and resume normal operations.

6. It is recognized that the Employer has the right to take disciplinary action, including discharge, against any employee who engages in any such unauthorized act or acts.

SENIORITY

1. When for any reason the employee force is increased or reduced or promotions or demotions are made or vacancies occur, the oldest employee in terms of service will be given preference for any job he is qualified to fill, and such employees will be given a reasonable trial period

on a new job before being disqualified. Qualifications under the seniority rule shall be determined jointly by the Employer and the Union. The oldest employee in point of service shall be given preference of shifts and jobs as vacancies occur, provided the efficiency of the operation is not retarded. "Rolling" shall not be permitted. When production is not running on full schedule, there shall not be any division or rotation of work and seniority shall prevail.

2. The last man laid off shall be the first man put back to work. It shall be the duty of all laid-off employees to notify their former Employer and the Union of any change of address. Such Employer shall notify the Union and said employee of opening for laid-off employees. Such employee shall report for work within seventy-two (72) hours after notification. Such seniority to expire seven (7) months after day of lay-off.

3. Any employee with the approval of his Employer shall be allowed to learn a new job in the plant in order to qualify himself for promotion or advancement in the plant, but not in any manner which will hamper or retard the orderly process of the plant, provided it is in the usual line of advancement. Said employee in learning a new job must learn new job under the supervision of the employee in charge of that particular job at his present rate of pay.

4. The Employers agree that they will submit a complete seniority list to the Union upon the signing of this Agreement, and thereafter a list of new employees and separations at intervals of not more than five (5) weeks.

SICK LEAVE

It is agreed that an employee may need up to seven (7) months to recuperate from an illness or an injury. He shall maintain and accrue seniority during his absence.

SCHEDULE AND REPORTING TIME

1. Shop schedules will be posted three days in advance. No major changes will be made in such schedules without notice except in cases of emergency.

2. The Employer shall notify each employee of any change in his next reporting time before such employee leaves for the day.

3. When an employee is required to report for work, and does report for work as scheduled, he shall receive not less than four (4) hours work at the rate for the job for which he is called. The Employer may furnish other than the regular work done by the employee.

ADDITIONAL PROPOSALS

In the paragraph under Agreement of the present contract we wish to subtract or delete the numbers 79 and 74 and all words pertaining to these two numbers.

Paragraph 3—delete: The Union will not interfere in any way with the sales policies of the employer or with its source of supplies of raw materials, equipment, supplies, power or other articles required by the employer in its unlimited discretion.

Paragraph 5—insert: The following days shall be considered as paid holidays: same holidays as in present contract. Delete the words, employer will allow. We propose that if an employee is required to work on any of the above holidays, he shall be compensated at the rate of one and one-half (1½) times his regular rate of pay.

Paragraph 6—Vacations with pay shall be granted in accordance with length of continuous service and on the following basis: 1 to 5 years service, 1 week; 5 or more years service, 2 weeks. Delete from this paragraph the words 'shall allow' in Section (a). In section (b) delete the entire section.

In rejecting all proposals made by the Union, Attorney Ball made the following statements:

"And we told Mr. Daniels at that time that all the Company was willing to do was to renew this contract that we had last year. And that's still our position."

"Here's a Company that's been out there a good while, and I think that most of the employees are satisfied or they wouldn't be working there. And if we can't get along together, well then that's just unfortunate. We are not going to turn our business over to some third party to make decisions about it."

"Well there just isn't any more I've got to say about it, we're just not willing to do it. No sir, we're not willing to consider."

"No sir. As I said, this arbitration clause, this dispute clause, that's all we are willing to do on that, we'd

like to have it just like it is; and the same way with the whole contract. I wrote you a letter and told you that we are not willing to make any changes in the contract but you said you wanted to meet and so we are here. But I mean, that doesn't change our position. This is what the Company is willing to do, is to renew this contract, and that's all. Now I don't know how many different ways I can say the same thing, but that's the Company's position. We are willing to renew this contract for a year from its expiration date and that's all we are willing to do."

"You might say that; I've got a closed mind so far as this contract is concerned. Just like you got a closed mind; you want to change the contract. I got a closed mind; I want to leave it just like it is."

"Well, I've told you what our position is; we are willing to renew this contract and if you don't want to do that well there's no way we can force you to do it. But we're just spinning our wheels here; you're talking and I'm listening; and I'm telling you that this is what we are willing to renew."

With respect to a wage increase, Attorney Ball stated:

"Now you understand Mr. Parker, that the wages here follow the wages at the other Company up in Illinois? Well, I know that the policy is a little unusual but this Company pays the same wages down here that the plant in Centralia pays. When Centralia gives a raise then they give a raise down here. In other words they keep these employees on a par although that probably is more favorable to the southern employees because, well, living is not

too expensive in Alabama as it is in Illinois, as a rule and I think that the Company has from time to time raised wages in Centralia, and when they do they raise wages here. But we are not going to raise wages here and give these employees here more than they give the employees in Centralia."

D. Refusal to furnish payroll data

During the negotiations on April 17, 1962, International Representative Parker requested permission to examine the payroll records of Respondent at its Centralia plant for the purpose of comparing the wage rates at Montgomery with those at the Centralia plant. Respondent refused to comply with this request by letter of April 19, 1962, as follows:

Dear Mr. Parker:

Re: Hollywood Brands, Inc.

At our meeting on Tuesday, April 17th, you proposed a wage increase. I representing the company stated that it is not willing to grant a wage increase. We mentioned the fact that the employees had had a wage increase about a year ago. It was also mentioned incidentally that it was the company's policy here to keep its wages in line with those paid comparable employees similarly engaged at Centralia, Illinois. You then asked to see the Centralia books and records and cited the General Aniline & Film Corporation case, 124 N.L.R.B. 1917, as authority for your right to see these records. I was not familiar with that case and stated to you that I would look at it and see if it supported your contention. I do not believe

that the case you cite is applicable to the present situation nor does it support your request. Accordingly, the company declines to allow you to examine the records at Centralia.

I believe that what you probably had in mind was the rule that where a company states that it is financially unable to give a wage increase that the union then has a right to inspect the records to a certain extent in order to determine whether the contention is in good faith. The company has made no such contention in this case.

Yours very truly,

FB:KBD

E. The unilateral wage increase

After refusing in April 1962 to negotiate with the Union concerning any wage increase, Attorney Fred Ball on July 9, 1962, posted a letter by registered mail to the union representative, as follows:

Dear Mr. Parker:

As you probably already know, Hollywood Brands, Inc. has a policy of giving its employees a wage increase at intervals of approximately one year.

It is also the policy of the company here to pay the same rates as are paid at the Centralia plant.

A 3% wage increase effective July 9, 1962, was put into effect in Centralia and the company

here plans to increase wages at this plant 3% effective July 9, 1962.

Although our negotiations seem to have deadlocked and it is doubtful whether the company is under any duty to do so, nevertheless we are notifying you of the company's plan and request that if you have any objection to please let me hear from you immediately, and not later than Monday, July 16, 1962, stating any grounds of objection you may have to this proposed increase.

Yours very truly,

The Union replied thereto by letter of July 17, 1962, as follows:

Dear Mr. Ball:

After returning to my office after a one (1) weeks absence I am in receipt of your letter of July 9, 1962 stating you are in a position to give a 3% increase in wages.

We are registering our objection as of this writing, and would appreciate the opportunity to sit down with you and the company to ascertain if this is an equitable amount and in what manner this increase will be distributed.

Awaiting the earliest date you have available for this meeting.

I remain,

Very truly yours,
John L. Parker

JLP/g1

IR-27-63

In further explanation of its desire to negotiate with respect to wage increases, the Union on July 19, 1962, posted a letter to Attorney Ball, as follows:

Dear Mr. Ball:

Your letter of July 18, 1962, stating that I did not give you any reason for my objection to the increase you plan to give the Hollywood Candy employees, was received with awe.

We have no objection to the increase as such, and are most happy that the company is in a position at this time to give an increase.

I thought I made our position quite clear. This increase regardless of the reason is a negotiating item. We are still the bargaining representative for these employees and as such are entitled to the right and privilege to help determine in which manner this increase will be applied.

If this explanation is not clear, please feel free to call me collect at FA 2-7462, and I will be most happy to discuss this matter with you at length.

If you desire a meeting as I do, then let me know which dates you will be available.

Yours very truly,

John L. Parker

JLP/hg

Notwithstanding objections by the Union and its repeated requests to negotiate concerning wage increases at

the Montgomery plant, the Respondent unilaterally granted an overall wage increase of 3 percent to employees in the appropriate unit effective July 9, 1962.

Concluding Findings

From the entire record in this case it is crystal clear that the Respondent entered into negotiations for a new contract with a predetermination to renew the expiring contract in its exact terminology and language, and to make no deviation from that position whatever. Its attorney merely listened to proposals from the Union, and gave them no consideration. Admittedly, his mind was closed to all proposals except his own initially made to renew the expired contract for 1 year under the exact terms and conditions provided therein. All proposals made by the Union with respect to the arbitration of unsettled grievances, seniority, job classification, sick leave, notice of changes in work schedules, wages and other working conditions have been found by the Board to be matters concerning which an employer is required by the Act to bargain in good faith with the certified exclusive representative of its employees in the appropriate unit. Although Respondent recognized the Union as such bargaining representative in this case, it made not even a pretense of trying to reach an agreement of any kind. It merely took the unyielding position (not a bargaining position) that the old contract was the only thing it would enter into in the nature of a collective-bargaining agreement. By adopting such a position, I find that the Respondent refused to bargain in good faith with the certified exclusive representative of its employees in violation of Section 8(a)(5) of the Act.

The Respondent cannot avoid its duty to bargain collectively with the certified exclusive representative of employees in the appropriate unit by adopting or following a company policy with respect to wages, hours, and other terms and conditions of employment establishment by higher management at its Centralia, Illinois, plant. It must, nevertheless, bargain in good faith with the Union with respect to wage rates paid to employees in the unit at its Montgomery plant. This includes the duty to furnish the Union with payroll information and other pertinent data existing at the Centralia plant, which the Respondent has proposed to adopt as a basis for establishing wage rates in the unit represented by the Union at Montgomery. I find, therefore, that the Respondent refused to bargain within the meaning of Section 8(a)(5) by denying such information to the Union.

At its final meeting with representatives of the Union on April 17, 1962, and again by letter of April 19, 1962, the Respondent refused to negotiate concerning any wage increase for employees at its Montgomery plant. Nevertheless, without negotiating with the Union, the Respondent on July 17, 1962, posted a notice to employees in the plant, as follows:

NOTICE TO EMPLOYEES

The Centralia plant management of this company has notified the management of the Montgomery plant that the Centralia plant is increasing its employees' wages 3% effective July 9, 1962.

As it is the policy of the management of the Montgomery plant to pay the same wage scale here

as that which is paid at Centralia, there will be a 3% wage increase here effective July 9, 1962.

The first pay checks which will include this increase will be issued on July 27, 1962.

Vice-President

July 17, 1962

I find, therefore, that the conduct of Respondent in unilaterally granting a wage increase effective July 9, 1962, without consulting the Union, as exclusive bargaining representative of its employees in the appropriate unit, constitutes a refusal to bargain within the meaning of Section 8(a)(5) of the Act.

IV. The effect of the unfair labor practices upon commerce

The conduct of Respondent set forth in section III, above, occurring in connection with the operations described in section I, above, has an intimate and substantial relation to trade, traffic, and commerce between the several States, and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Respondent since on or about October 27, 1961, has refused to bargain collectively with United Bakery & Confectionery Workers Local 441-B, as the representative of its employees, subject to the provi-

sions of Section 9(a) of the Act, thereby engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act and interfering with, restraining, and coercing such employees in the exercise of the rights guaranteed in Section 7 of the Act, it will be recommended that Respondent cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act. It will be recommended that the Respondent upon request, bargain collectively, as defined in Section 8(d) of the Act, with the Union as the certified exclusive bargaining representative of its employees in the unit herein found to be appropriate at its Montgomery, Alabama, plant, and if an understanding is reached, embody such understanding in a signed agreement. It will be further recommended that Respondent furnish and make accessible to the Union all pertinent payroll data and other records which it has proposed to use as a basis for establishing wage rates and other terms and conditions of employment at its Montgomery plant.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

Conclusions of Law

1. Hollywood Brands, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Bakery & Confectionery Workers Local 441-B is a subdivision of Retail, Wholesale and Department Store Union, AFL-CIO, and is a labor organization within the meaning of Section 2(5) of the Act.

3. All production, maintenance, shipping, and cleaning employees of the Respondent at its candy manufacturing plant in Montgomery, Alabama, excluding office employees, executives, watchmen and guards, truckdrivers, salesmen, foremen, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. On October 27, 1961, and at all times thereafter material to this case, Retail, Wholesale and Department Store Union, AFL-CIO, including its agency subdivision, United Bakery & Confectionery Workers Local 441-B was and now is the certified exclusive bargaining representative of respondent's employees in aforesaid appropriate unit at its Montgomery, Alabama, plant.

5. By refusing at all times since October 27, 1961, to bargain with the Union as exclusive representative of its employees in the appropriate unit at Montgomery, Alabama, unilaterally granting an increase in wages to such employees effective July 9, 1962, and refusing to permit inspection of pertinent payroll records at Centralia, Illinois, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in the case, I issue the following:

IR-27-63

RECOMMENDED ORDER

Hollywood Brands, Inc., its agents, supervisors, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Retail, Wholesale and Department Store Union, AFL-CIO, and or its agency subdivision, United Bakery & Confectionery Workers Local 441-B, as the certified exclusive bargaining representative of all employees in the unit herein found to be appropriate at its Montgomery, Alabama, plant.

(b) In any manner interfering with, restraining or coercing its employees and their exclusive representative in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Union request, bargain collectively in good faith with aforesaid labor organization as the exclusive representative of all its employees in the unit herein found to be appropriate at its Montgomery, Alabama, plant, and when an understanding is reached embody such understanding in a signed agreement.

(b) Furnish and make available for inspection by the Union all pertinent payroll data and other records proposed by Respondent as the basis of establishing wage rates, job classifications, or other terms and conditions at its Montgomery, Alabama, plant including all such records maintained at its plant in Centralia, Illinois

(c) Post at its plant in Montgomery, Alabama, copies of the notice hereto attached as Appendix.[5] Copies of said notice to be furnished by the Regional Director for the Fifteenth Region, shall, after being duly signed by an authorized representative of the Respondent, be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by any other material.

[5] If this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. If the Board's Order be enforced by a decree of a United States Court of Appeals, the notice will be further amended by substitution of the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" for the words "A DECISION AND ORDER."

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO THE RECOMMENDED ORDER OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL, upon request, bargain in good faith with UNITED BAKERY & CONFECTIONERY WORKERS LOCAL 441-B, as the exclusive bargaining representative of all our employees in the unit herein found to be appropriate for the purposes of collective bargaining with respect to wages, hours, and other terms and conditions of employment, and if an understanding is reached embody such understanding in a signed agreement.

The appropriate unit is:

> All production, maintenance, shipping and cleaning employees at our Montgomery, Alabama, candy manufacturing plant, excluding office employees, executives, watchmen, guards, truckdrivers, salesmen, foremen, and supervisors as defined in the Act.

WE WILL, without prejudice to existing wage rates, furnish for inspection by the above named Union all pertinent payroll data and other records used by us as a basis for establishing rates of pay and job classifications at our Montgomery, Ala-

bama, plant, including such records and data now maintained at our plant in Centralia, Illinois.

HOLLYWOOD BRANDS, INC.

.....
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

Employees may communicate directly with the Board's Regional Office, T6024 Federal Building (Loyola) 701 Loyola Avenue, New Orleans 12, Louisiana (Tel. No. 529-2411), if they have any question concerning this notice or compliance with its provisions.

(d) Notify in writing the Regional Director for the Fifteenth Region, New Orleans, Louisiana, within 20 days from receipt thereof, what steps the Respondent has taken to comply with this Recommended Order.[6]

Dated at Washington, D. C.

.....
Lee J. Best
Trial Examiner

[6] If this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Fifteenth Region in writing within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

142 NLRB No. 25 D-5297

Montgomery, Ala.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HOLLYWOOD BRANDS, INC.
and
UNITED BAKERY & CONFECTIONERY WORKERS LOCAL 441-B

Case No. 15-CA-2103

DECISION AND ORDER

On January 29, 1963, Trial Examiner Lee J. Best issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief, and the General Counsel filed exceptions to the Intermediate Report.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in this case, including the Intermediate Report, the excep-

tions, and brief, and hereby adopts the findings,[1] conclusions and recommendations of the Trial Examiner with the modifications stated below.[2]

ORDER

The Board adopts as its Order the "Recommended Order" of the Trial Examiner with the following modifications:

---

[1] Although Member Rodgers concurs in the finding that Respondent engaged in bad-faith bargaining and unlawfully granted the wage increase of July 9, 1962, in violation of Section 8(a)(5), he would not find that Respondent further violated this section of the Act by refusing to furnish the Union—the bargaining agent for the Montgomery, Alabama, plant employees only—payroll information and other data pertaining to employees at Respondent's Centralia, Illinois, plant.

[2] Respondent contends that it did not refuse to furnish the Union with "payroll information and other pertinent data" because the Union made no such request and asked only that it be permitted to "look at the books" of the Respondent. We find no merit in this contention. The stipulated record of the meeting of April 17, 1962, shows (1) that the Union representative asked "to look at the books to determine what the parallel wages are" at the Respondent's Centralia and Montgomery plants, and (2) that the Respondent representative clearly indicated his understanding that the Union was requesting wage data by the following statement: "Let's see now, what you want. You want to look at the [Centralia] pay records . . . and you want to look at the [Montgomery] pay records . . . to verify the fact that they've got the same pay"? As the record shows that the Union's request for wage information at both plants followed Respondent's statement that it would not give its Montgomery employees a raise before one was given to its Centralia employees, we find, contrary to the dissent on this issue, that the Union was justified in extending its request to Centralia although it was the bargaining agent for only the Montgomery employees. As it is well established that an employer must comply with union requests for wage data as part of its obligation to bargain in good faith, we agree with the Trial Examiner that the Respondent violated Section 8(a)(5) of the Act by refusing to furnish such data to the Union herein. See Oates Bros., Inc., 135 NLRB 1295; and Clegg Machine Works, 129 NLRB 1243.

D-5297

1. The following paragraph shall be inserted after 1(a) of the Recommended Order:

(b) Cease and desist from making any changes with respect to rates of pay, wages, hours of employment, and other conditions of employment in the bargaining unit described herein, without prior consultation with Retail, Wholesale and Department Store Union, AFL-CIO, and/or its agency subdivision, United Bakery & Confectionery Workers Local 441-B.

2. The following paragraph shall be substituted for paragraph 1(b) of the Recommended Order:

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. The following paragraph shall be inserted before the first paragraph of the Notice:

WE WILL NOT make any changes with respect to rates of pay, wages, hours of employment, and other conditions of employment in the bargaining unit described herein, without prior consultation with RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO, and/or its agency subdivision, UNITED BAKERY & CONFECTIONERY WORKERS LOCAL 441-B.

4. The following shall be substituted for the Union name in the first paragraph of the Notice:

D-3297

RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO, and/or its agency subdivision, UNITED BAKERY & CONFECTIONERY WORKERS LOCAL 441-B.

Dated, Washington, D. C. Apr 25 1963

Frank W. McCulloch, Chairman

Philip Ray Rodgers, Member

John H. Fanning, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX "C"

This is:

—an excerpt from the transcript (Joint Exhibit 3) of the April 17, 1962, meeting beginning at page 48, at which the Union representative Parker requested permission to see the employer's records (Joint Exhibit 3):

"MR. BALL: Well, I know that the policy is a little unusual but this company pays the same wages down here that the plant in Centralia pays. When Centralia gives a raise then they give a raise down here. In other words they keep these employees on a par although that probably is more favorable to the southern employees because well living is not too expensive in Alabama as it is in Illinois, as a rule and I think that the company has from time to time raised wages in Centralia, and when they do they raise wages here. But we are not going to raise wages here and give these employees here more than they give the employees in Centralia. Actually in substance they get more now; they get the same dollar now; they get more purchasing power here than they are getting in Centralia, so we're not going to agree to a wage increase.

MR. PARKER: Purchasing power, as such, is a debatable issue, as far as dollars and cents are concerned.

MR. BALL: Well, I'm not going to debate it with you—if you don't agree, well I'm sorry, but that's the way it looks to us.

MR. PARKER: Do you have the records as to what the pay scale is in Centralia?

MR. BALL: No, I don't have it with me.

MR. PARKER: IS that Illinois?

MR. BALL: Yes. That's well known at the plant. It's been that way for years, I'm surprised they didn't tell you.

MR. PARKER: Well, like I say—how is that spelled?

MR. HELMS: C E N T R A L I A.

MR. PARKER: You state that the plant up there determines the wages down here. In other words if they get a wage increase up there, then they pass the wage increase on down here.

MR. HELMS: Yes.

MR. PARKER: Would it be possible for me to look at the books to determine what the parallel wages are, in these two places.

MR. BALL: Now, what books do you want to look at?

MR. PARKER: If Centralia is the determining factor, in that they give a wage increase, then it's passed on down here, then those are the books that I want to see.

MR. BALL: I don't know whether you are entitled to look at the Centralia books or not. I don't know if you are entitled to look at the books here or not. So I can't give you an answer on that.

If the law gives it to you, then of course we'll give it to you. If the law doesn't give it to you then I don't much think that Centralia would want to open their books to anybody.

MR. PARKER: Well, I would not have asked you that question, if I hadn't been aware of the fact that I was entitled to look at the books if the factor involved is a wage increase. There have been rulings by the National Labor Relations Board in the 1960 edition, I don't know what page it's on, nor what the case is, but a case did arise.

MR. BALL: Do you remember the name of the case?

MR. PARKER: No, sir. Here—General Aniline and Film Corporation, 124 N.L.R.B., 1217 to 1220. Hands book to Mr. Ball.

MR. BALL: I'll take a look at that, when I get time. Want me to glance at that while we're here?

MR. PARKER: Yes, let me find it for you. I've got the page here.

MR. BALL: I'll have to let you know about that, Mr. Parker, later on.

MR. PARKER: All right.

MR. BALL: Let's see now, what you want. You want to look at the pay records of the Centralia Company, and you want to look at the pay records of the Montgomery Company, to verify the fact that they've got the same pay?

MR. PARKER: The female employees and the male employees, the maintenance employees and the clean-up employees make relatively the same.

MR. BALL: Well, I'll let you know about that.

MR. PARKER: All right."

—The employer's letter to Parker declining the request (Joint Exhibit 6 (f)):

BALL AND BALL
Attorneys and Counsellors
First National Bank Building
Montgomery, Ala.

April 19, 1962

Mr. John L. Parker
1712 Seventh Avenue, North
Birmingham, Alabama

Dear Mr. Parker:

Re: Hollywood Brands, Inc.

At our meeting on Tuesday, April 17th, you proposed a wage increase. I representing the company stated that it is not willing to grant a wage increase. We mentioned the fact that the employees had had a wage increase about a year ago. It was also mentioned incidentally that it was the company's policy here to keep its wages in line with those paid comparable employees similarly engaged at Centralia, Illinois. You then asked to see the Centralia books and records and cited the General Aniline & Film Corporation case, 124 N.L.R.B.

1917, as authority for your right to see these records. I was not familiar with that case and stated to you that I would look at it and see if it supported your contention. I do not believe that the case you cite is applicable to the present situation nor does it support your request. Accordingly, the company declines to allow you to examine the records at Centralia.

I believe that what you probably had in mind was the rule that where a company states that it is financially unable to give a wage increase that the union then has a right to inspect the records to a certain extent in order to determine whether the contention is in good faith. The company has made no such contention in this case.

Yours very truly,

/s/ Fred Ball.

FB:KBD

APPENDIX "D"

Employer's announcement of July 19, 1947, of its policy of paying Montgomery plant employees wages equivalent to those paid at its Centralia plant:

HOLLYWOOD NUT PRODUCTS CO.
Division Hollywood Brands Inc.
Post Office Box 1012
Montgomery, Alabama

July 19, 1947

Hollywood Nut Products Co., a Division of Hollywood Brands, Inc., has been in operation in the City of Montgomery for approximately six months. In the early stages of our operations, as in all new ventures, it was necessary to assemble and train personnel for our type of work. The management of Hollywood Brands, Inc., now feels that this training period has progressed to the point where people employed in its Montgomery Plant are able to perform their work in a comparable manner with those people employed in its other manufacturing plants.

In keeping with the policy of Hollywood Brands, Inc., in paying comparable wages in all of its plants, many of you will find increases in wages included with this pay check. The rate per hour you are now making is the same hourly rate paid by Hollywood Brands, Inc., in its other candy manufacturing plants for the same work you are doing.

The company will expect you to perform work in a manner equally efficient with its other

operating units so that production in the Montgomery Plant can be maintained on an equal basis with its other plants.

Very truly yours,

HOLLYWOOD BRANDS, INC.
/s/ C. R. Martoccio
C. R. MARTOCCIO
EXECUTIVE VICE PRESIDENT

APPENDIX "E"

Letter to Union about proposed Montgomery wage increase to equal the one given its Centralia employees (Joint Exhibit 6 (k)) and the Union reply (Joint Exhibit 6 (l)):

BALL AND BALL
Attorneys and Counsellors
First National Bank Building
Montgomery, Ala.

July 9, 1962

Mr. John L. Parker
1712 7th Avenue, North
Birmingham, Alabama

Dear Mr. Parker:

As you probably already know, Hollywood Brands, Inc., has a policy of giving its employees a wage increase at intervals of approximately one year.

It is also the policy of the company here to pay the same rates as are paid at the Centralia plant.

A 3% wage increase effective July 9, 1962, was put into effect in Centralia and the company here plans to increase wages at this plant 3% effective July 9, 1962.

Although our negotiations seem to have deadlocked and it is doubtful whether the company is under any duty to do so, nevertheless we are

notifying you of the company's plan and request that if you have any objection to please let me hear from you immediately, and not later than Monday, July 16, 1962, stating any grounds of objection you may have to this proposed increase.

Yours very truly,
/s/ Fred S. Ball, Jr.

FB/mc

cc: Hollywood Brands, Inc.
P. O. Box 1012
Montgomery, Alabama

Certified—Return Receipt.

Retail, Wholesale & Department Store Union
A.F.L.-C.I.O.
REGIONAL OFFICE
1712 7th Avenue, North
PHONE FA 2-7462
BIRMINGHAM, ALA.

July 17, 1962

Mr. Fred Ball, Esquire

Attorney at Law
First National Bank Building
Montgomery, Alabama
Dear Mr. Ball:

After returning to my office after a one (1) weeks absence I am in receipt of your letter of July 9, 1962 stating you were in a position to give a 3% increase in wages.

We are registering our objections as of this writing, and would appreciate the opportunity to sit down with you and the company to ascertain if this is an equitable amount and in what manner this increase will be distributed.

Awaiting the earliest date you have available for this meeting.

I remain,

Very truly yours,
/s/ John L. Parker
John L. Parker

JLP/gl

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 923

HOLLYWOOD BRANDS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion and judgment of the court of appeals (Pet. 23) is reported at 324 F. 2d 956, and its *per curiam* opinion denying petitioner's application for rehearing (Pet. 23), is reported at 326 F. 2d 400. The Board's decision and order (Pet. 59–62, 25–54; R. 29–71) [1] are reported at 142 NLRB No. 25.

[1] "R." refers to the "Mimeographed Record"; "P.A." refers to the exhibits included at the end of the Company's brief in the court below; "B.A." refers to the portions of the testimony and exhibits printed in a separate appendix to the Board's brief in the court below. These materials are on file with the Clerk of the Court.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1963, and the application for rehearing was denied on January 29, 1964 (Pet. 23). A decree (Pet. 23–24) was entered on February 7, 1964. The petition for a writ of certiorari was filed on March 17, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, by refusing to bargain in good faith on contract changes proposed by the union, by refusing to furnish pertinent wage information, and by unilaterally granting a wage increase.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth in the Appendix, *infra*, p. 13.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. THE COMPANY'S REFUSAL TO NEGOTIATE IN GOOD FAITH ON THE UNION'S PROPOSED CONTRACT CHANGES

The Company's headquarters are located in Centralia, Illinois, where it has a plant which is engaged in the manufacture of candy. It opened another candy plant in Montgomery, Alabama, in 1947. On

May 12, 1960, the Union [2] was certified, after a Board-conducted election, as the exclusive bargaining representative of the production and maintenance employees at the Montgomery plant (R. 38; B.A. 19). On April 24, 1961, the Company and the Union executed a contract effective until October 15, 1961 (R. 38–46; B.A. 18). On September 15, 1961, the Union notified the Company that it desired to reopen and make changes in the contract. On October 25, 1961, the Union requested negotiations on an arbitration clause; a seniority and better working conditions clause; job classifications; a three-day notice before changing work schedules; and wage increases (R. 46; B.A. 73–74, 17). On October 27, 1961, the Company's attorney, Fred S. Ball, Jr., posted a letter to the Union stating in part (R. 47):

> With reference to the five proposals for discussion in the meeting, it would only be fair for me to tell you now that the company is not willing to agree to any of these five items.
>
> If you want to propose a new contract for a period of one year identical with the one which has expired, that could be done without the necessity of a meeting.
>
> I realize that it is the duty of the company to meet and negotiate and am willing to do so, but at the same time it seems to me that it would be a waste of your time as well as ours to meet for the purpose of discussing the five points, none of which are agreeable to the com-

[2] Retail, Wholesale and Department Store Union, AFL-CIO, and its agency subdivision, United Bakery & Confectionery Workers Local 441-B.

pany. However, if you insist upon meeting it will have to be at a date later than next week * * *.

Attorney Ball and Personnel Director Helms met with Union negotiators on November 19, 1961, January 23, 1962, and April 17, 1962. At the first meeting on November 19, 1961, Ball rejected the Union's requests for an arbitration clause and a general pay increase. He stated that the Company was giving as much notice as possible before changing work schedules but refused to include in the contract any provision requiring the giving of notice; and, though agreeing to discuss with the plant manager a change in the Company rule whereby an employee lost seniority upon returning to work after an extended illness, he declared that he was "not going to agree to put that into the contract" (R. 48–50; B.A. 36). As the meeting ended, Ball summarized the Company's position as follows: "We have worked under a contract now that we have had, and it has proven to be one that has worked out all right, and I think it is good enough like it is; and I hope you all will decide to let well-enough alone" (R. 50; P.A. 7).

At the second meeting on January 23, 1962, after again refusing to make any changes whatever in the old contract, Ball said: "I'm just hoping that you will drop me a note and say 'dear Mr. Ball, please rewrite the contract as to 5 October,' and send it to me, and we'll get it signed up" (R. 50–51). At the final meeting on April 17, 1962, International Representative John L. Parker appeared as chief negotiator for the Union. The Union submitted comprehensive

contract proposals in writing respecting the arbitration of grievances, seniority, sick leave, changes in work schedules, and holiday and vacation pay (R. 51–57). Ball rejected all proposed contract changes, stating, "* * * I wrote you a letter and told you that we are not willing to make any changes in the contract but you said you wanted to meet and so we are here. But I mean, that doesn't change our position" (R. 58–59; B.A. 41, 61).

2. THE COMPANY'S REFUSAL TO FURNISH PERTINENT WAGE DATA TO THE UNION

At the first meeting on November 19, 1961, the Union requested a general wage increase of 25 cents an hour. Attorney Ball said it was Company policy to follow the wage rates paid at the main plant in Centralia and therefore "we couldn't even think about a pay raise, because as I understand it, we do keep the two companies in the same pay scale" (R. 50). At the April 17, 1962 meeting, International Representative Parker said the Union was willing to leave the amount of a general wage increase up to the Company but believed that there were inequities in the wage structure at the Montgomery plant. Ball replied that the Montgomery employees were paid the same wages as the Centralia employees and that they would not get a raise before the Centralia employees were given one (R. 31, n. 2; B.A. 66–67). Parker then asked permission for the Union "to look at the books to determine what the parallel wages are" (Pet. 64; B.A. 69). Ball commented: "Let's see now, what you want. You want to look at the [Centralia]

pay records * * * and you want to look at the [Montgomery] pay records * * * to verify the fact that they've got the same pay?" (Pet. 65; B.A. 70). Ball agreed to let Parker know "within a few days whether we are obligated to let [the Union] see those records." He then asked, "Will you go to Centralia just to look at the records?" Parker answered affirmatively (B.A. 71–72). By letter dated April 19, 1962, Ball advised Parker that he did not believe the Union had a right to see the Company records and therefore that the Company "declines to allow you to examine the records at Centralia."[*]

3. THE UNILATERAL WAGE INCREASE

On July 9, 1962, Ball notified Parker by letter that the Centralia plant employees had been given a three percent wage increase that day and that the Company intended to put the same increase into effect at the Montgomery plant. He asked Parker to reply by July 16, "stating any grounds of objection you may have to this proposed increase" (Pet. 70–71). By letter dated July 17, Parker advised Ball that he had returned to his office after a week's absence, that the Union was registering its objection to the three percent wage increase "as of this writing," and that "[we] would appreciate the opportunity to sit down with you and the company to ascertain if this is an equitable amount and in what manner this increase will be distributed." Parker ended his letter with a request for "the earliest date you have avail-

[*] The text of this letter is set forth at pages 66–67 of the petition.

able for this meeting" (Pet. 71–72). Ball replied on July 18 that the Union had failed to give any reason why the Company should not continue its previous policy of giving wage increases in Montgomery when they are given at the Centralia plant. He made no mention of Parker's request for a meeting (B.A. 82–83). On July 19, Parker replied that the Union had no objection to the wage increase as such, but, as the Union was the employees' bargaining representative, it had the right to help determine the manner in which the wage increase would be applied. Parker again advised Ball that the Union would like to have another meeting in order to discuss the proposed wage increase (R. 64–65; B.A. 83–84). To this Ball replied, "In your letter of the 19th you state that you have no objection to the increase. Are we to understand that you are withdrawing your protest?" (B.A. 85). On July 24, Parker wrote Ball, "we are for the fourth time telling you that we object to the increase of 3 percent for the employees at Hollywood Brands, Inc. Please let me know what dates you will be available to discuss this matter" (B.A. 86). On July 27, Ball advised Parker (B.A. 87–88):

> In your letter you ask for the dates I will be available to discuss this matter. If by that you mean the matter of this increase, I do not see anything to discuss in view of the fact that the increase has already been put into effect. If you want to discuss a further wage increase, I will, of course, meet with you and listen to you, but I must tell you in advance

> that this is all the increase the company is going to give at this time. If you want to meet and discuss taking this increase away from the employees, that would also be useless as the company would not be willing to do that.

The employees received the increase in their next paychecks.

B. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board concluded (Pet. 59–60, 50–52) that the Company violated Section 8(a)(5) and (1) of the Act (App., *infra*, p. 13) by refusing to bargain in good faith with the Union over the terms of a new contract, by refusing to furnish relevant wage data respecting the Centralia, Illinois, plant,[4] and by unilaterally granting a wage increase to its employees.

The Board's order (Pet. 60–62; 55–58) requires the Company to cease and desist from the unfair labor practices found, and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act (29 U.S.C. 157). Affirmatively, the Board's order requires the Company, upon request, to bargain with the Union in good faith, to furnish and make available to the Union payroll data and other records pertinent to wage rates and job classifications at both the Montgomery and Centralia plants, and to post an appropriate notice.

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[4] One Board member dissented from this finding (Pet. 60, n. 1).

C. THE COURT OF APPEALS DECISION

Finding ample support in the record for the Board's findings, the court below, in a *per curiam* opinion, enforced the Board's order (Pet. 23).

ARGUMENT

As the court below stated in denying petitioner's request for rehearing, "The law concerning all three questions [raised by petitioner] is so well settled as not to justify further discussion. The only debatable question concerns the Board's factual inferences and findings which, in our opinion, are supported by substantial evidence in the record" (Pet. 23). Such evidentiary issues do not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. In any event, the conclusion of the court below is clearly correct.

1. Petitioner contends (Pet. 14-16) that it fulfilled its statutory obligation to bargain with the Union because it met with the Union, discussed the Union's contract proposals and offered to renew its previous contract with the Union. It argues that to find it guilty of a refusal to bargain in these circumstances is in effect to require it to agree to the Union's proposals, contrary to Section 8(d) of the Act (App., *infra*, p. 13), which provides that the bargaining obligation "does not compel either party to agree to a proposal or require the making of a concession * * *." This contention, however, presupposes that petitioner entered "into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement." *National Labor Relations*

Board v. *Herman Sausage Co.*, 275 F. 2d 229, 231–232 (C.A. 5).[5]

The Board and the court of appeals were fully justified in concluding that petitioner did not do so here—that on the contrary, it "entered into negotiations for a new contract with a predetermination to renew the expiring contract in its exact terminology and language, and to make no deviation from that position whatever" (R. 65; Pet. 50). This constitutes a refusal to bargain. Thus, as shown, pp. 3–5, *supra*, before negotiations began, the Company told the Union that it would accept a new one-year contract "identical with the one which has expired," but that it considered discussion of the Union's proposed changes "a waste of your time as well as ours." The Company thereafter met with the Union three times but repeated at each meeting that it would only accept a renewal of the old contract, and even rejected changes which it conceded were reasonable. Company Negotiator Ball, in rejecting all of the Union's proposals at the end of the third bargaining session, summed up its intransigent attitude in these words: "I wrote you a letter and told you that we are not willing to make any changes in the contract but you said you wanted to meet and so we are here. But * * * that doesn't change our position."

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[5] *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, relied on by petitioner (Pet. 12–14), is not to the contrary. Although finding that the negotiations there were conducted in good faith, the Court specifically noted that "performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences" (p. 402).

2. Petitioner's contention that it was never asked for information about the wages paid at its Centralia plant (Pet. 17) is contrary to the record. As shown pp. 5–6, *supra*, when Ball stated that the Montgomery employees were paid the same wages as the Centralia employees and would not get a wage increase before the latter did (thereby making the Centralia wage structure relevant to the Montgomery negotiations), Union Negotiator Parker asked permission for the Union "to look at the books to determine what the parallel wages are." Ball clearly interpreted this as a request for wage data at Centralia, for he stated: "Let's see now, what you want. You want to look at the [Centralia] pay records * * * and you want to look at the [Montgomery] pay records * * * to verify the fact that they've got the same pay?" Petitioner's contention that it is obliged to furnish "information" but not "records" (Pet. 17) is frivolous. A bare statement of what the wage rates were at Centralia, without any means of enabling the Union to verify those rates or to determine the manner in which they were computed and the job classifications to which they related, would have been of little value. As the Court has observed in a related connection: "If such an argument [here, that wages in the two plants were parallel] is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." *National Labor Relations Board* v. *Truitt Manufacturing Co.*, 351 U.S. 149, 152–153.

3. Petitioner's contention (Pet. 17–20) that it consulted with the Union before granting the wage in-

crease is belied by the record. Petitioner, without first discussing the matter with the Union, notified the Union that it was planning to put a three percent wage increase into effect. Although it afforded the Union an opportunity to "object," this was only a token gesture. For it refused all of the Union's requests to arrange a meeting to discuss the increase (pp. 6–8, *supra*). In these circumstances, there was clearly not the kind of negotiation with the bargaining representative contemplated by the Act. See *National Labor Relations Board* v. *Katz*, 369 U.S. 736. Nor can petitioner contend that the parties had reached a *bona fide* impasse (Pet. 18) which justified it in taking unilateral action, for any impasse was caused by the Company's prior unfair labor practices in refusing to bargain in good faith and to furnish relevant wage information. See *National Labor Relations Board* v. *Herman Sausage Co.*, 275 F. 2d 229, 234 (C.A. 5).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
LAURENCE GOLD,
Attorney,
National Labor Relations Board.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

> Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * *
>
> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *.
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